Supreme Court, U.S.
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No. 98-684

In The

Supreme Court of the United States

October Term, 1998

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Idaho

REPLY BRIEF FOR THE STATE OF IDAHO

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REPLY BRIEF FOR THE STATE OF IDAHO

The United States argued that "the Idaho Supreme Court correctly found that an 'express intention' to reserve water was clear from the enabling legislation [for PWR 107]." Brief For The United States In Opposition (the "U.S. Opposition Brief"), at 15. The United States makes this argument even though applicable federal regulations promulgated prior to this date and continued through 1976 are inconsistent with this claim. Like the United States, the Idaho Supreme Court ignored these regulations. Rather, the United States incorrectly continues to argue that the United States has consistently interpreted the PWR 107 as a federal reservation of water. Nothing could be further from the truth. Simply put, the United States in its Opposition Brief ignored the primary undisputed facts that establish PWR 107 did not create a federal reservation of water.

I. Federal Regulations Governing the Administration of Public Water Reserves Negate any Claim of a Federal Reserve Water Right.

The Department of the Interior issued its decision in *State of Utah*, 45 I.D. 551 (1916) during final congressional action on H.R. 407, 64th Cong. 2nd Sess. (1916), the bill that would become the Stock Raising Homestead Act, ch. 9, 39 Stat. 862 ("SRHA"). The Assistant Secretary of the Interior concluded: "**There is in the withdrawal of these lands [for a public water reserve] nothing which prevents any person filing such an appropriation [of water] under the laws of Utah at any time.**" *Id.* 45 I.D. at 554. The State of Idaho argued this history shows that at the

time of enactment of the SRHA, Congress understood public water reserves were not intended to preclude the appropriation of water under state law; rather they were only intended to prevent entry of the land withdrawn under the various land disposal laws then in effect. Indeed, the Secretary of the Interior explained in 1913 that public water reserves were not intended to interfere with the appropriation of water from the water holes and springs under state law. Secretary Lane stated:

> The reserves do nothing more than withdraw from all forms of disposition the lands containing and surrounding the watering places. There has been no attempt on the part of the Government to interfere with the appropriation or utilization of waters which originate upon or flow across such reserves. It is difficult, therefore, to see how the reserves can interfere with the State laws for the appropriation and utilization of water.

Letter from Secretary of the Interior Lane to Senator George Sutherland (April 12, 1913) (on file with Department of the Interior, Central Classified Files 1907-1936, File 2-153, National Archives, College Park, Md.).

The entry of PWR 107 did not change this relationship. In 1925 the Department of the Interior adopted regulations in *Circular No. 1028, Use of Lands Withdrawn As Public Water Reserves*, 51 I.D. 186 (1925), that described the procedures for a person to use water from a public water reserve. That regulation required a member of the public as a condition of using water from a public water reserve spring to obtain a state water right. It stated:

> 8. Each permit shall contain, besides those necessary in individual cases, the following conditions:
>
> > A. That the right to appropriate the waters of the State to the uses contemplated shall be obtained within one year from and after issuance of the permit and the permittee shall file a certificate to that effect issued by the proper State authority.

Id. 51 I.D. at 187 (emphasis added). This regulation is directly inconsistent with the United States' present legal position. The United States argues that PWR 107 creates a federal reserve water right that precludes the private appropriation of water. Yet, the regulation required a member of the public to obtain a state water right if that person intended to use water from the public water reserve. Significantly, this regulation that was adopted just prior to entry of PWR 107 was continued in effect through 1976. For example, section 2311.3 of Title 43, Code of Federal Regulations, contained the regulations governing the use of water from public water reserves in 1970. Subsection (f) of that section states, in part:

> (f) *Conditions of permit; failure to comply with the same.* (1) Each permit shall contain, . . . the following conditions:
>
> (i) That the right to appropriate the waters of the State to the uses contemplated shall be obtained within 1 year from and after the issuance of the permit and the permittee shall file a certificate to that effect issued by the proper State authority.

43 C.F.R. 2311.3(f) (1970); Exhibit 28. A comparison of the two regulations shows that the requirement in 1925 is virtually identical with the requirement in 1970. Thus, this requirement to obtain a state water right when a member of the public wanted to use water from a public water reserve remained in effect for the entire applicable period. *See also* 43 C.F.R. 2311.3 (1976).

This history refutes the United States' contention that Congress and the Executive intended to reserve water by the creation of public water reserves.

II. This Case Warrants Review.

The United States suggests that this case does not warrant review because the assertion of these claims are consistent with the State's water policies and because only a handful of individuals objected to the government's PWR 107 claims. Both of these assertions misrepresent the situation before the Court.

The United States argues:

> PWR 107's creation of modest reserved rights for stock watering does not, as a practical matter, have any significant effect on water allocation with the State of Idaho. Idaho has itself recognized the right of the United States to obtain water rights on public land so that the federal government can properly manage and implement its rangeland grazing program. See, *e.g.*, Idaho Code § 42-501 (1990) [sic].

U.S. Opposition Brief at 18. The State of Idaho has encouraged the United States to utilize its state system of property law regarding water rights. For example, Idaho

Code § 42-501 (1996) reduces the application fee for the United States and streamlines the process for processing such applications. This case is not about that process, and the United States' PWR 107 claims are not consistent with state policy. Rather, the United States under the guise of a claim for PWR 107 proposes to create its own water right allocation system outside the state system.[1] This Court in *United States v. New Mexico*, 438 U.S. 696 (1978) specifically rejected such a system for lands reserved by the U.S. Forest Service. *Id.* 438 U.S. at 717, n. 24. If the United States' contention in this matter prevails, a most anomalous result will occur. The State of Idaho will allocate water rights on lands expressly reserved by the U.S. Forest Service for governmental purposes; but the Bureau of Land Management will allocate water rights on the vacant public domain lands.

The United States' argument that "[o]nly a handful of individuals objected to the government's PWR 107 claims" and that, therefore, this is not a substantial dispute misrepresents the situation. U.S. Opposition Brief at 19, n. 12. First, this case arose out of proceedings that began in three sub-basins of over twenty within the Snake River Basin in Idaho. Procedurally, most of the stockwatering claims under PWR 107 have not been

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[1] The United States argues: "In addition, the federal reserved water rights created by PWR 107 will be administered under the State's prior appropriation doctrine. . . . " U.S. Opposition Brief at 18-19. The term "administration" as it relates to water rights may have different meanings. We understand the United States' argument and the Idaho Supreme Court's opinion to continue to recognize the distribution of water under state water law.

before the Idaho District Court for objection. Thus, the number of objections to PWR 107 claims is not a relevant criteria for determining the importance of these claims. Furthermore, contrary to the United States' argument, the number of water right claimants potentially affected is large because the United States asserts a priority date of April 17, 1926, for these claims. Many water rights have been developed in the State of Idaho since that date.

Second, a comparison of the amount of water diverted by stockwatering rights with the amount of water leaving the state at Lewiston, Idaho is an irrelevant comparison. U.S. Opposition Brief at 19, n. 12. Typically, the sources of water within public water reserves are the primary source of water within the immediate vicinity. The fact that the Snake River or one of its major tributaries is many miles downstream does not alleviate the water supply scarcity existing at the location of the public water reserve.

While the quantity of water may be small, the potential impact of the United States' argument is enormous. The practical effect of the United States' argument is to vest control over the patchwork of in-holdings of private and state lands adjacent to the public water reserves because it will control the allocation of scarce water supplies for adjacent state and private lands. Through a system designed to make water available for these lands, the United States attempts to construe the Idaho Supreme Court's decision as surrendering to it the exclusive right to allocate the scarce water supplies for these lands.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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